

The KRITI AKTI - Last Voyage Orders

A time charterparty, self-evidently, is characterised by the use of a ship for a period. Where the charter provides for a definite period, the courts will normally imply an additional reasonable margin to that period. The parties will, however, generally build some flexibility into that period by defining the period as falling within a range (such as "4 to 6 months"), expressly qualifying the period with "about" or by providing for a margin such as "30 days more or less at the charterer's option".

In considering charterer's final voyage orders therefore, an owner must focus on:

- the *actual period* of the charter and the effect of any contractual or implied margin, and
- whether, when the time comes to comply with those orders, the voyage can reasonably be expected to be complete within that period.

The first of these issues has been revisited by the High Court recently in the case of the KRITI AKTI.

The KRITI AKTI is a ship entered in the Association. In 2000, the owner Member fixed her to charterers on amended Shelltime 3 Form. Clause 3 provided for:

'...a period of 11 (eleven) months, 15 days more or less in Charterers' option

commencing from the time and date of delivery of the vessel....'

Clause 18 of the charterparty provided:

'...Notwithstanding the provisions of Clause 3 hereof, should the vessel be upon a voyage at the expiry of the period of this charter, charterers shall have the use of the vessel at the same rate and conditions for such extended time as may be necessary for the completion of the round voyage on which she is engaged and her return to a port of redelivery as provided by this charter...'

The charter also provided that any off-hire periods could be added, at the charterer's option, to extend the charter period.

The ship was delivered on 25th May 2000. The 11-month period therefore expired on 24th April 2001. On 13th March 2001, the charterer advised the owner that it was exercising the option to extend the charter to 14th June 2001. This date was calculated by adding on the 15-day option plus 36 days of alleged off hire. The owner disputed the off-hire period, admitting only 17.6 days.

When final voyage orders were given on 29th May 2001, to complete a laden voyage back to New York, the owner regarded the fixture as having already ended. The owner offered to perform the voyage at the then market rate of hire but this offer was declined. The ship was redelivered on 7th June 2001 at Sao Sebastiao.

The charterer commenced arbitration claiming damages for the owner's wrongful refusal to

comply with its voyage orders. This refusal could only be wrongful if the charterer could add on both the 15-day option period and off-hire. The tribunal considered, as a preliminary issue, which of these periods could be added.

The tribunal found that the charterer could add on the off-hire period but not the 15-day option period. In reaching this decision, the arbitrators felt bound by the Court of Appeal decision in the *ASPA MARIA*. In that case, the charterparty permitted an extension of the period by '6 months 30 days more or less at the charterer's option'. The Court of Appeal excluded the 30-day option period. The Court said that it was not an option in the strict sense but a period of tolerance, to protect charterers from the consequences of accidental early or late redelivery arising out of trading uncertainty.

The charterer of the KRITI AKTI appealed to the High Court. The High Court ruled that the charterer *could* employ the ship for the basic period, the off-hire period *and* the option period. The owner was therefore in breach of charter by refusing the charterer's final voyage orders. The owner was given leave to appeal and the case was heard by the Court of Appeal in late January.

The Managers will report the outcome of the case in a further issue of Soundings.

As English law stands, when considering the maximum period of a charter and whether the owners should comply with final orders, owners must add to the basic period any options in excess of the basic period, if exercised, together with any off-hire periods, if provided for in the charter.

Judicial Sales – Buyer Beware?

In most cases of enforced sale of a ship, the creditors' claims will exceed the ship's value. It is in both the owner's and creditors' interests to achieve the best sale price. A buyer's priority will be a clean bill of sale and title free from encumbrances. Any risk that the ship will still be encumbered after the sale will reduce her potential for re-sale at a later date. A judicial sale in the UK, and many other jurisdictions, will extinguish all pre-existing claims against the ship, even maritime liens. This contrasts with a private sale where maritime liens survive a change of ownership.

A maritime lien is a privileged charge over property. In a sense it is 'invisible' as it travels with the ship from the moment she is created. Under English law, the categories of claim giving rise to a maritime lien are damage done by a ship, salvage, Master's wages and disbursements, and crews' wages. In other jurisdictions the categories can be more wide-ranging.

When is there a judicial sale?

Ships are generally arrested in order to secure a particular claim. The proceedings culminate in the exchange of the ship's release for security, usually a bank guarantee or P & I Club letter of undertaking. Relatively few cases each year result in a judicial sale. By way of illustration, in 2002, the English Admiralty Court reported only 3 judicial sales.

For further information on any matters covered by Soundings, please contact the Managers

The effect of a judicial sale – 'free of liens and encumbrances....'

If security is not provided, the ship remains in the custody of the Admiralty Marshall. Following a consideration of the claims on their merits, the ship is appraised and sold by the court. This is usually done by private treaty although there can be a public auction. Either way, the court will sanction a sale free from encumbrances. All maritime and statutory liens will be extinguished by that sale. The rights of the claimants are transferred to the proceeds of sale in court. These are then distributed in accordance with the priority of claims set down by the court.

....or not?

In the light of a recent case in which a Member of the Association was involved however, the buyer may still need to beware. A judicial sale may, arguably, not be recognised worldwide as expunging all maritime liens. In particular, the buyer may be wise to take advice on the law of the flag of registration at the time of sale and make efforts to delete the ship from its previous registry concurrently with the purchase.

The case concerned the purchase of a Turkish registered ship at judicial auction in South Africa. She was advertised as being sold free of all liens and encumbrances. The court had advised the Turkish Register that she would be sold by judicial auction and requested details of any special Turkish law requirements. No response was received.

After the sale, the Turkish Registry was advised that the ship was in new ownership

**The UK Defence Club
c/o Thomas Miller Defence Ltd
International House
26 Creechurch Lane
London, EC3A 5BA**

with clean title. Claims were then lodged against the sale proceeds and assessed by the South African court. The new owners registered her under the Panamanian flag. They did not delete her from the Turkish Register who, they felt, were well aware of the sale.

The ship traded without incident until she was arrested, first in Turkey, then in Italy, on both occasions in respect of alleged claims that pre-existed the judicial sale. The claimants (who had failed in their claims against the sale proceeds in court) alleged that, despite the judicial sale and new ownership, such a sale did not extinguish existing maritime liens and encumbrances under Turkish law.

With the assistance of the Association, The Member successfully challenged both arrests. However, there were costly delays to the ship's schedules and significant legal costs were incurred.

This case may be truly exceptional but it shows that Members buying ships at judicial auction should still exercise caution. If such cases were to become commonplace, the maritime industry would suffer. Innocent purchasers would increasingly discount the price they would willing to pay for a ship. Financial institutions and other creditors would recover less, leaving greater residual losses for owners and, ultimately, the industry to bear.

Members aware of similar incidents are asked to inform the Managers.

All issues of Soundings can be viewed on the Association's website, from which they can also be downloaded.

Tel: +44 7000 333362 Facsimile: +44 20 7204 2